TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 306. 94.

THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 6, 1896.

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(16,128)

SUPREME COURT OF THE UNITED STATES.

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No. 396.

THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, PLAINTIFF IN ERROR,

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THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 13, 1897.

1 In the Court of Appeals of the District of Columbia.

THOMAS W. STEWART, Adm'r, &c., Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 403.

Supreme Court of the District of Columbia.

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, Late of the District of Columbia,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Law. No. 29581.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration. Filed April 1st, 1889.

THOMAS W. STEWART, Adm'r of the Estate of John Andrew Casey, Late of the District of Columbia,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Law. No. 29581.

1889, April 1st. Declaration, &c., filed.
" May 4th. Plea, " not guilty," filed.
1894, " 26th. Plea withdrawn and demurrer to declaration filed.
1894, October 20th. Demurrer to declaration sustained, with leave to plaintiff to amend.

2 *Amended Declaration.*

Filed October 22, 1894. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

THOMAS W. STEWART, Adm'r of the Estate of John Andrew Casey, Late of the District of Columbia,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Law. No. 29581.

Amended declaration.

Thomas W. Stewart, administrator of the estate of John Andrew Casey, late of the District of Columbia, sues the Baltimore and Ohio

railroad, a corporation created and existing under and by virtue of the laws of the State of Maryland and doing business in the State of Maryland and also in the District of Columbia, and for cause of action say- that the said defendant, The Baltimore and Ohio Railroad, was, at the time hereinafter mentioned and set forth, a common carrier of passengers and goods and chattels for hire in the State of Maryland (as well as in said District of Columbia under and by virtue of certain laws thereof), and of mails of the United States and of postal clerks and employees engaged and employed in connection with the carrying of the mails of the United States of America on, over, along, and by means of the said railroad of the defendant at different points and places in the State of Maryland and the District of Columbia, and that among other places and points from which said mails were so carried (with said postal clerks as aforesaid) was from and to the city of Washington and in the State of Maryland along and over the defendant's said railroad in said State between certain stations or locations of said railroad commonly known and called Dickerson and Tuscarora; that on or about the 6th day of October, 1888, the said Andrew Casey, deceased, was employed and engaged as a postal clerk on the said railroad of the defendant in connection with certain mails of the United States, and then and there, on a car of said defendant, between said localities or stations, and while being carried on said road in said capacity as postal clerk in connection with said mails as aforesaid, by the wrongful acts, negligence, and carelessness of the defendant, its servants, and agents in charge of and connected with said railroad and cars of defendant on which the mails aforesaid were being carried and without any negligence on his part, a collision took place between said cars, engines, and machinery and certain other cars, engines, and machinery of said defendant, whereby and by reason of which the said John Andrew Casey lost his life and was killed, and by reason of said collision, accident, and death the plaintiff is entitled to maintain an action against the defendant and re-
3 cover damages from the defendant by reason of its wrongful acts, neglect, carelessness, and improper conduct aforesaid, and because of the death of said intestate, John Andrew Casey.

And the plaintiff further says that the said John Andrew Casey left surviving him no parent or child, but only his wife, Alice Triplett Casey, for whose benefit and to whose use this action is brought.

And the plaintiff claims for her use and benefit damages for the said wrongful acts, negligence, and fault of the defendant, its servants and agents as aforesaid, the sum of ten thousand dollars ($10,000.00), besides costs of this suit.

Second count. And for a further cause of action the plaintiff says that on or about the 6th day of October, 1888, the defendant was the owner of a certain railroad commonly called and known as the Baltimore and Ohio railroad, existing under and by virtue of the laws of the State of Maryland, and within the limits of the District of Columbia by virtue of acts of the Congress of the United States, and having an office and a place of business in said District, and

on or about said day was engaged in operating said railroad by means of engines, cars, carriages, conductors, and other employees and agents and servants, and in the carrying of passengers thereon for hire; and also under contracts made by virtue of the laws of the United States in such case made and provided in carrying mails of the United States, and also in connection with said mails in carrying agents of the Post Office Department of the United States and postal clerks; and that said defendant, on or about said day, among others, admitted and received on its cars and train one John Andrew Casey as a postal clerk, he being regularly and duly appointed such clerk, and having as such clerk a right to be conveyed and carried on said car and train, and that among the points between which he was authorized and empowered to act as such postal clerk as aforesaid, and to be carried and conveyed to and fro by said defendant was from the city of Washington to and between Dickerson and Tuscarora, stations on said railroad of the defendant in the State of Maryland; and that while the said John Andrew Casey was properly and legally on said car of said defendant as said postal clerk, the defendant, its agents and employees having control of and management of one of its said cars, by its and their carelessness, negligence, indifference, and want of due care and proper attention, allowed a collision to take place between one of its said engines and trains on its said railroad, and under the care of its agents and employees, who were also careless, negligent, and indifferent, whereby and by reason of which negligence and collision aforesaid, without any want of due and proper care on his part, the said John Andrew Casey while on said mail train as a postal clerk aforesaid was immediately killed, by reason whereof the plaintiff, as the administrator of the estate of the said John Andrew Casey, is entitled to maintain an action against the said defendant for the recovery of damages arising out of the death of the said John Andrew Casey for and on behalf of the wife of the said John Andrew Casey, to wit, Alice Triplett Casey, the said John Andrew Casey having left surviving him no parent or child, but only his said wife.

4 And the said plaintiff claims damages as aforesaid by and because of the wrongful acts and negligence of the defendant, its agents, servants, and employees, as aforesaid, in the sum of ten thousand dollars ($10,000.00), besides costs of this suit.

And the plaintiff says that the wrongful act-, neglect, and default complained of, to wit, the said negligence, carelessness, recklessness, and improper conduct aforesaid of the defendant, its servants, and agents, were committed and occurred in the said State of Maryland, by the statute law of which said State, to wit, a certain act or law duly enacted as chapter —, sections 1–4, Revised Code of Maryland, 1878, page 724, provides as follows:

SECTION 1. Whenever the death of a person shall be caused by the wrongful act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for dam-

ages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony.

SECTION 2. Every such action shall be for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct; provided, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of the deceased person.

SECTION 3. In every such action, the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

SECTION 4. The following words and expressions used in the three preceding sections are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context, or by the nature of the subject-matter that is to say: the word person shall apply to both politic and corporate, and all corporations shall be responsible under the three preceding sections for the wrongful acts, neglect or default, of all agents employed by them.

COOK & SUTHERLAND,
Att'ys for Pl'f.

5 The defendant is to plead hereto on or before the first day of the first special term of the court, occur-ing twenty days after service hereof; otherwise judgment.

COOK & SUTHERLAND,
Att'ys for Pl'f

Demu er to Amended Declaration.

Filed October 23, 1894.

In the Supreme Court of the District of Columbia.

THOMAS W. STEWART
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } At Law. No. 29581.

The defendant says that the amended declaration filed in the above-entitled cause is bad in substance.

HAMILTON & COLBERT,
Att'ys for Defendant.

NOTE.—Among the matters of law intended to be relied on in support of the foregoing demurrer are the following:

1. There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland by the alleged wrongful act of the defendant.

2. The provisions of the Maryland act cannot be enforced in the District of Columbia.

1894, October 23rd.—Demurrer to amended declaration sustained and judgment thereon for defendant for costs.

Order for Appeal and Citation.

Filed October 24, 1894.

In the Supreme Court of the District of Columbia, the 24th Day of October, 1894.

THOMAS W. STEWART, Administrator,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } At Law. No. 29581.

The clerk of said court will please enter an appeal from the judgment of the court sustaining the demurrer of the defendant, The Baltimore and Ohio Railroad Company, to the plaintiff's amended declaration, and issue citation on said appeal.

COOK AND SUTHERLAND,
Attorneys for Plaintiff.

6 In the Supreme Court of the District of Columbia.

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } At Law. No. 29581.

The President of the United States to the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, on the 7th day of January, A. D. 1895, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 24th day of October, 1894, wherein Thomas W. Stewart, administrator of the estate of John Andrew Casey, is appellant and you are appellee, to show cause, if any there be, why the judgment—decree—rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 24th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 24th day of October, 1894.

HAMILTON & COLBERT,
Attorney- for Appellee.

(Endorsed :) No. 29581. Law. Thos. W. Stewart, adm'r, *vs.* Baltimore and Ohio Railroad Company. Citation. Issued Oct. 24th, 1894. Served cop- of the within citation on — ——. ——, marshal. Cook & Sutherland, attorney- for appellant.

Supreme Court of the District of Columbia.

I, J. R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 7, inclusive, are true copies of the originals in cause No. 29581, at law, wherein Thomas W. Stewart, administrator of the estate of John Andrew Casey, late of the District of Columbia, is complainant and the Baltimore and Ohio Railroad Company is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

7 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 5th day of November, A. D. 1894.

JOHN R. YOUNG,
Clerk Supreme Court District of Columbia.

Endorsed on cover: District of Columbia supreme court. No. 403. Thomas W. Stewart, adm'r, &c., appellant, *vs.* The Baltimore and Ohio Railroad Company. Court of Appeals, District of Columbia. Filed Dec. 1, 1894. Robert Willett, clerk.

8 THURSDAY, *March 19th, A. D.* 1895.

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 403.

The argument in the above-entitled cause was commenced by Mr. Edwin Sutherland, attorney for the appellant, and was continued by Mr. M. J. Colbert, attorney for the appellee.

WEDNESDAY, *March 20th, A. D.* 1895.

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 403.

The argument in the above-entitled cause was continued by Mr. George E. Hamilton, attorney for the appellee, and was concluded by Mr. William A. Cook, attorney for the appellant.

9 THOMAS W. STEWART, Administratrix of the Estate of John Andrew Casey, Appellant, vs. THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 403.

Opinion.

Mr. Justice Cox, of the supreme court of the District of Columbia, who sat with the court in the hearing of the case in the place of Mr. Justice Morris, delivered the opinion of the court:

This case was as follows: John Andrew Casey, late of the District of Columbia, was employed as postal clerk in the service of the United States, and on a car of the defendant company, when, on the 6th of October, 1888, he was killed in a collision on the defendant's road, in the State of Maryland, between two stations known as Dickerson and Tuscarora, through the negligence, as it is alleged, of the defendant's agents. He left a widow, Alice Triplett Casey, but no parent or child.

The plaintiff took out letters of administration on Casey's

10 estate in the District of Columbia, and brought this suit for the use of the widow, to recover damages for the wrongful negligence which caused the death.

The declaration contains two counts. They both show the death to have been caused in the State of Maryland. But the first count claims relief generally, as if it might be had under the laws of the District; whereas the second sets forth the provisions of the Revised Code of Maryland, affecting this subject, and bases the claim upon them. A demurrer was filed on these grounds, viz:

1. There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland, by the alleged wrongful act of the defendant.

2. The provisions of the Maryland act cannot be enforced in the District of Columbia.

The demurrer was sustained, and judgment entered for the defendant, from which the plaintiff appealed to this court.

It is very clear that the act of Congress, 23 Stat. at Large, p. 307, providing relief for cases like that described in the declaration, applies only to such casualties occurring in the District of Columbia, and is inapplicable to the present case. The demurrer, therefore, is well taken as to the first ground alleged, which is understood to present this question.

The only debatable question is, whether this action can be maintained by virtue of the provisions of the code of Maryland set out in the declaration.

The Maryland law, like those of the States generally, and our act of Congress, in its main features, is copied from Lord Campbell's act, and provides that: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover

damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony."

In respect to the form of remedy provided, it differs from other statutes. It enacts that, "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury, by their verdict, shall find and direct."

In contrast with this, our statute provides that, "Every such action shall be brought by and in the name of the personal representative of the deceased person;" and that the damages recovered "shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions in force in the District of Columbia."

Under the law of Maryland, the damages for the injury described in this case would go to the wife. Under our statute, if it had occurred in the District, they would be divided equally between the wife and any collateral next of kin.

It will thus be seen that the equitable plaintiff is seeking to recover damages given by a law of Maryland for an injury suffered in that State, by means of a remedy provided by the laws of this District for an injury suffered here. Can this be done?

The case of Dennick *v.* Railway Co., 103 U. S., 11, is, of course, the leading authority for us on this subject of recovery for injuries causing death. That was an action by the administratrix of a party killed, through negligence, in New Jersey, who had taken out letters and brought her action in New York. The laws of New York and New Jersey were similar, and gave the right of action to the same person, the personal representative. When the court decided to apply the rule of State comity to torts, which had theretofore only applied to contracts, *i. e.* when they held that what was made an actionable tort in one State must be so treated everywhere else, there was no difficulty in holding that the person to whom the right of action was given in both States might sue in either.

But the present case presents quite a different question, the action being brought by a person to whom the statute under which relief is sought does not give a right of action.

The case of Dennick *v.* Railway Co., like all others, recognizes the right to damages for an injury causing death as a novelty in the law—as a right which did not exist at common law, but which is entirely statutory. And here the plaintiff is confronted with the rule, that, in such case, the remedy provided by the statute is the only one that can be resorted to.

This was recognized in the case of Pollard *v.* Bailey, 20 Wall., 520. A law of Alabama made stockholders of a bank individually liable for the debts of the bank, and according to the construction given to the law by the Supreme Court, the remedy provided by the law was a suit in equity, whereas in that case a single creditor had sued one of the stockholders at common law. The court said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement. * * * The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But when the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

So, in the case of Fourth National Bank of New York *v.* Franklyn, 120 U. S. 747, it appeared that the statutes of Rhode Island made the stockholders of a manufacturing corporation individually liable for its debts, and directed that the proceeding to enforce the liability should be either by suit in equity or by action
11 of debt on a judgment first obtained against the corporation. It was held that a creditor could not bring a suit at law against the executor of a stockholder of a Rhode Island corporation in the State of New York without having obtained judgment against the corporation, even if the corporation had been adjudged bankrupt. The court reaffirmed the doctrine of Pollard *v.* Bailey, saying: "In all the diversity of opinion in the courts of the different States upon the question how far a liability imposed upon the stockholders in a corporation by the law of the State which creates it, can be pursued in a court beyond the limits of that State, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders. The provisions of the Rhode Island statutes which made the stockholders of the Atlantic De Laine Company liable for its debts was coupled with provisions prescribing the form of the remedy. * * * By the decisions of this court, as well as by those of the courts, both State and Federal, held within the State and district of Rhode Island, and of the highest court of Massachusetts, where these provisions had their origin and their first judicial construction, this liability can be enforced only in the mode prescribed by the statutes of Rhode Island. The present suit, therefore, not being a bill in equity, or an action upon a judgment against the corporation, which are the only forms of remedy authorized by these statutes, but being an independent action at law

upon the original liability of the stockholder, cannot be maintained, and the circuit court rightly so held.

These cases seem to fit the present case exactly. If the legislature of Maryland had simply declared, generally, that a person causing the death of another wrongfully or negligently, should be liable in damages to the family of the deceased, they might, in their own names, have instituted suit. But since a particular form of action is prescribed, they are confined to that.

Again, it must be very clear that this action could not have been maintained in the State of Maryland. To hold that it can be maintained here would be to subject the defendant to different kinds of suits in every State in which they may happen to be instituted, which could not have been intended.

There may be the best of reasons for confining the parties intended to be benefited to the very form of relief provided in the statute. The policy of the Maryland law was to confine that relief to the immediate family of the deceased, viz: the wife, parent and child of a man. But in some of the States, it is extended to collaterals, and in others it enures to the estate generally. Tiffany's Death by Wrongful Act, sec. 25, 81. While it is true that an administrator suing in another State to enforce rights given by the statute of Maryland, might, as the Supreme Court say in Dennick *v.* Railway Co., be required by the court to apply the proceeds according to the Maryland law, yet, on the other hand, it is also true that the administrator is subject to the law of his State, and by that law he might not be allowed to make such application, but might be required to administer them for the benefit of creditors and next of kin generally, which would be entirely contrary to the policy and intent of the Maryland law, which does not treat the damages recovered as the subject of administration.

We are, therefore, of opinion that the present suit by the administrator, to claim the damages allowed by the Code of Maryland for the injury alleged in the declaration, cannot be maintained, and that an action therefor can only be maintained, under that code, by and in the name of the State of Maryland.

But we further think, that even this form of action was not intended by the Maryland Code to be authorized except in the courts of that State. It is incredible that the State would consent or intend to be a suitor in the courts of another jurisdiction, in a matter not of public interest, especially where it would or might be for the use of a citizen of another State against her own citizens. And that is exactly this case, the defendant being incorporated by, and being, for certain purposes, a citizen of Maryland.

Again, the statute of Maryland gives the action for the use of the wife, parent and child, not apportioning the damages among them, but leaving that to be done by the trial jury; and it is hardly to be supposed that the State of Maryland would attempt to impose a duty of that sort upon juries of other States, or any others than the juries subject to her legislative control.

If such be the intent of the Maryland statute, it would seem that no relief can be had under it in any other State.

A similar question was made in the case of Bruce's Adm'r *v.* Cincinnati Railroad Co., 83 Kentucky, 174. That was a suit in Kentucky against the railroad company, by the administrater of a brakeman killed in a collision on defendant's road in Tennessee. The court say (page 183): "But counsel suggest, as a question, whether the Tennessee statute confers the right of action, in a case like this, alone upon a personal representative of its own appointment, or on any personal representative. The tacit adoption of it by this State being presumed the main inquiry is, whether the operation of the statute is, by its own terms or by fair construction, restricted to that State. If it is, then the controversy is at an end, for no one can maintain an action under it in this State." And again, referring to a previous case, of Taylor's Adm'r *v.* The Pennsylvania Company, 78 Ky., the court say: "It was true that it was held in that case that the Indiana statute was not intended to have any extraterritorial operation. But the reason it was so held was, that the administrator appointed under the laws of this State could not take the right of action in that case in virtue of his office, but as a trust for the widow, children and next of kin of the deceased; and thus he would have to be invested with rights and perform duties which the Indiana legislature had no power to prescribe, and which it is presumed it did not intend to prescribe, except as

12 to personal representatives appointed in that State." Again: "But it is proper to say that in our opinion, whenever the statute of another State gives a right of action for the destruction of the life of one person, by the negligence of another, such action may be maintained here, unless the court is satisfied it was not intended to operate beyond the limits of the State enacting it."

The above language is particularly appropriate to that part of the Maryland statute referring to the duty of juries in actions under the statute. That State had no power, and could not have intended, to charge upon the juries of other States the duty of deciding the claims of the respective beneficiaries to damages recovered in these actions.

The final objection to the maintenance of the present action is one foreshadowed in what has already been said, viz., that, in the language of Story's Conflict of Laws, sec. 556: "It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to the *lex fori*;" and that the proceeding directed by the Maryland Code is entirely foreign to the forensic law of this District, and could not be prescribed by the State of Maryland, for the government of our courts.

One of the very questions to be determined by the *lex fori* is, Who is to sue for a wrong? For example, as between assignor and assignee of a chose in action, that is to be determined by this law (Story's Conflict of Laws, sec. 566); and in common-law courts this would be held in one way, while in courts governed by the Roman

civil law it might be different. See, also, a discussion of this subject in Glenn *v.* Busey, 5 Mackey, 243.

The Maryland Code recognizes a death wrongfully caused as an injury to the wife, child and parent of the decedent. In this District, while we recognize actions *ex contractu* as properly brought by one for the use of another, an action *ex delicto* of that kind is unknown. By the common law, which is our *lex fori*, an action of that kind must be brought by the party injured, an exception being made only by our statute in relation to deaths wrongfully caused in this District, in which case, as if the cause of action survived, the personal representative may sue and distribute any damages recovered as the rest of the personal estate of the decedent, according to our statute of distributions. We are compelled by the authority of Dennick *v.* Railway Co., to recognize the right to indemnity of the family of a decedent whose death was caused in Maryland by negligence; but we are not obliged to recognize the State of Maryland as a proper suitor in our courts in their behalf.

Again, the statute of Maryland gives the right to damages to the wife, parent and child of a male victim, but instead of designating the proportions in which they shall be entitled, leaves that to be decided by a jury. Suppose the statute had in terms provided that in any suit brought in another State for a death wrongfully caused in Maryland, the damages should be divided among the parties in such manner as should be decided by the court trying the suit; could it be maintained that the court of a sister State could derive any authority or jurisdiction from the act of Maryland so to decide? And could it, with even as much show of reason, be held that the statute in question could impose a duty upon the court so to decide? And if not the court, could the jury of another State be charged with any such duty?

These questions must be answered in the negative. If the legislature of Maryland, instead of defining rights, leaves them to be decided elsewhere, it may speak with authority as to the tribunals of their own State, but they can neither confer authority nor impose a duty on those of another jurisdiction. If so, their statute under consideration cannot be executed in this District.

The equitable plaintiff, then, would seem to be in this predicament, to wit, that she cannot sue, claiming under the law of Maryland, except by and in the name of that State, and that she cannot bring such a suit in this District because, first, the statute does not authorize such a suit, and next, because it could not authorize such a suit, if the legislature of Maryland had so intended.

We are therefore satisfied that the demurrer was properly sustained. The judgment must be affirmed.

13 MONDAY, *April 1st, A. D.* 1895.

* * * * * * *

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, Appellant, *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY. } April Term, 1895. No. 403.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE COX.

April 1, 1895.

14 THURSDAY, *April 4th, A. D.* 1895.

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, Appellant, *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 403.

On motion of Mr. Edwin Sutherland, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of four hundred dollars.

15 Know all men by these presents that we, Thomas W. Stewart, administrator of the estate of John Andrew Casey, as principal, and S. M. Pool, as surety, are held and firmly bound unto the Baltimore and Ohio Railroad Company in the full and just sum of four hundred dollars, to be paid to the said The Baltimore and Ohio Railroad Company or its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Thomas W. Stewart, administrator of the estate of John Andrew Casey, appellant, and The Baltimore and Ohio Railroad Company, appellee, a judgment was rendered against the said Thomas W. Stewart, administrator of the estate of John Andrew Casey, and the said Thomas W. Stewart, administrator of the estate of John Andrew Casey, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Baltimore and Ohio Railroad Company, citing and admonishing it to be and appear at a Supreme Court of

the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Thomas W. Stewart, administrator of the estate of John Andrew Casey, shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THOS. W. STEWART. [SEAL.]
S. M. POOL. [SEAL.]

Sealed and delivered in the presence of—
PAUL J. QUINN.
JAMES L. MOCK.

This bond is satisfactory.

G. E. HAMILTON,
M. J. COLBERT,
For Appellee.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 403. Thomas W. Stewart, adm'r of estate of John Andrew Casey, *vs.* The B. & O. R. R. Co. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 22, 1895. Robert Willett, clerk.

16 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Thomas W. Stewart, administrator of the estate of John Andrew Casey, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 23d day of April, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.

G. E. HAMILTON,
M. J. COLBERT,
Attorneys for Appellee.

April 23, 1895.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 23, 1895. Robert Willett, clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Thomas W. Stewart, administrator of the estate of John Andrew Casey, appellant, and The Baltimore and Ohio Railroad Company, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of April, in the year of our Lord one thousand eight hundred and ninety-five.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

18 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 17, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas W. Stewart, administrator of the estate of John Andrew Casey, *vs.* The Baltimore and Ohio Railroad Company, No. 403, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26th day of April, A. D. 1895.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,128. District of Columbia Court of Appeals. Term No., 396. Thomas W. Stewart, administrator of the estate of John Andrew Casey, plaintiff in error, *vs.* The Baltimore and Ohio Railroad Company. Filed January 6, 1896.

No. 97.

Brief of Sutherland for P. C.

Filed Nov. 2, 1897.

In the Supreme Court of the United States.

October Term, 1897.

No. 97.

THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, *Plaintiff in Error*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

EDWIN SUTHERLAND,
Attorney for Plaintiff in Error.

JOHN F. SHERRY, PRINTER, 628 D STREET.

In the Supreme Court of the United States.

October Term, 1897.

No. 97.

THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, *Plaintiff in Error*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action by Thomas W. Stewart, administrator of the estate of John Andrew Casey, for the benefit of the widow of the said Casey. The said John Andrew Casey was killed in an accident which occurred on the defendant's railroad between Dickerson and Tuscarora, in Maryland, on the 6th day of October, 1888. The deceased, at the time of the accident, was employed as a railway postal clerk, and as such, entitled to be carried to and fro on the defendant's road between Washington, D. C., and Tuscarora, Maryland, and while so engaged, was killed by reason of a collision occurring between the train deceased was on and another of defendant's trains on defendant's road between the above-mentioned places.

The suit was instituted on April 1, 1889, and on May 4, 1889, the defendant appeared generally and filed its plea of "not guilty." The case rested until May 26, 1894, when the plea was withdrawn and a demurrer to the declaration filed. The demurrer was sustained, with leave to the plaintiff to amend; and an amended declaration was filed on the 22d of October, 1894, setting forth the provisions of the Maryland Act.

The defendant filed a demurrer to the amended declaration, which demurrer alleged as legal propositions: (1) That the plaintiff could not recover in the District of Columbia for the death of his intestate in the State of Maryland, caused by the wrongful act of the defendant; (2) That the provisions of the act of Maryland could not be enforced in the District of Columbia.

This demurrer was sustained and an appeal duly taken and prosecuted.

Assignment of Errors.

1. The court erred in permitting the defendant to withdraw its plea in bar after the general appearance of the defendant.

2. The court erred in holding that the action could not be maintained in the District of Columbia.

3. The court erred in holding that the plaintiff was endeavoring to enforce the Maryland Act.

I.

The suit was filed April 1, 1889, a general appearance and plea of not guilty was filed on May 4, 1889, and on May 26, 1894, the plea in bar was withdrawn and a demurrer filed. It is respectfully submitted that, in view of the decisions of this court, that should not have been permitted.

In Kern *v.* Huidekoper, 103 U. S., 485, this court said: "The asking of leave to plead to the jurisdiction was in effect a withdrawal of the plea to the merits, for after a plea in bar the defendant cannot plead to the jurisdiction of the court, for by pleading in bar he submits to the jurisdiction. I Chitty Pleading, 440, 441; Co. Lit., 303; Com. Dig. Abatement, C.; Bacon Abr. Abatement (A)."

In Railway Company *v.* Church, 137 U. S., 568, it was held that misnomer of a corporation plaintiff was pleadable in abatement only, and was waived by pleading to the merits.

In Railway Company *v.* McBride, 141 U. S., 127, it was said: "* * * There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service but all special privileges of the defendant in respect to the particular court in which the action is brought. * * "

And again, 'Still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. *Ex parte* Schollenberger, 96 U. S., 369; Toland *v.* Sprague, 12 Pet., 300; Pollard *v.* Dwight, 4 Cranch, 421; Barry *v.* Foyles, 1 Pet., 311; Lexington *v.* Butler, 14 Wall., 282; Claflin *v.* Ins. Co., 110 U. S., 81."

And again, "Without multiplying authorities on this question it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. Charlotte Bank *v.* Morgan, 132 U. S., 141; Construction Company *v.* Fitzgerald, 137 U. S., 98."

In Shaw *v.* Mining Company, 145 U. S., 444, it was said: "The Quinby Mining Company, a corporation of Michigan,

having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York by a citizen of another State, there can be no question of waiver such as has been recognized where a defendant appeared generally in a suit between citizens of different States brought in the wrong district."

In Trust Company *v.* McGeorge, 151 U. S., 129, the court again announces the doctrine, so often announced theretofore, that the exemption of being sued out of the district of the domicil of the defendant is a personal privilege which may be waived, and which is waived by pleading to the merits.

In Construction Company *v.* Gibney, 160 U. S., 221, it was said: "The defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection."

It scarcely need be necessary to further multiply authorities, and comment on the authorities cited would be a work of superogation, as they speak more eloquently than could the author of this brief.

II.

An Action of Damages for Death in Maryland Caused by a Wrongful Act is Sustainable in the District of Columbia.

In Scudder *v.* Bank, 91 U. S., 406, it was said: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where brought."

In Dennick *v.* Railway Company, 103 U. S., 11, it was said: "The rule that 'the courts of no country execute the penal laws of another' * * * cannot be invoked as applicable to a statute of this kind, which merely authorizes 'a civil action, to recover damages for a civil injury.'"

In Myrick *v.* Railway Company, 107 U. S., 102, it was said: "In passing upon the rights of parties, this court will not be controlled by the judicial decisions of the State where the contract of carriage was made."

In Dennick *v.* Railway Company, 103 U. S , 11, it was said:

"It (the action of tort for death by wrongful act) is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendent may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. * * *

"It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right. * * *

"The action in the present case is in the nature of trepass to the person, always held to be transitory, and the venue immaterial. The local court and the Circuit Court of the United States for the northern district were competent to try such a case when the parties were properly before it.

"We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape the liability by going to New York. It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the

statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of citizens be redressed in no other State of the Union? The contrary has been held in many cases * * *."

That recovery may be had in a foreign jurisdiction for a death caused by wrongful act, because the action is transitory in its nature and the venue immaterial, is announced broadly, authoritatively, and conclusively, without qualification or hair-splitting distinction, appears from the court's further remarks.

"We are aware that Woodward *v.* Railway Company, 10 Ohio St., 121, asserts a different doctrine, and that it has been followed by Richardson *v.* Railway Company, 98 Mass., 85, and McCarty *v.* Railway Company, 18 Kan., 46. The reasons which support that view we have endeavored to show are not sound.

"The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decisions, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action."

"In Texas & Pacific Railway Company *v.* Cox, 145 U. S., 593, the eminent counsel for the appellant, Hon John F. Dillon, laid great stress on the proposition that 'The rule that the courts of Texas will not take jurisdiction of an action for damages of this character, where the cause of action arose in another State and under a foreign statute dissimilar in terms to the corresponding Texas statute, or where there is no corresponding Texas statute, has been repeatedly announced by the highest State court of Texas.'

The contention of counsel was disposed of thus: 'Counsel further urge with much earnestness, that the cause of action founded upon the statute of Louisiana, conferring the right to recover damages for an injury resulting in death was not enforcable in Texas.'

"The action being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but as a statutory delict, it was contended that it must be justiciable not only where the act was done but where redress is sought. If a tort at common law where a suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired; but if the cause of action was created by statute, then the law of the forum and of the wrong must substantially concur in order to render legal redress demandable.

"In The Antelope, 10 Wheat., 66, 123, Mr. Chief Justice Marshall stated the international rule, with customary force, that: 'The courts of no country execute the penal laws of another;' but we have held that the rule cannot be invoked as applicable to a statute of this kind, which merely authorizes 'a civil action to recover damages for a civil injury.' (Dennick *v.* Railway Co. 103 U. S. 11) * * *.

"And notwithstanding some contrariety of decision upon the point, the rule thus stated is generally recognized and applied where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced. * * *.

"In Texas and Pacific Railway *v.* Richards, 68 Tex., 375, it was said that while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one State, would be recognized and enforced in the courts of another State whose laws gave a like right under the same facts. In St. Louis Iron Mountain &c., Railroad Co. *v.* McCormick, 71 Tex., 660, the Supreme Court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas; for the reason that the statutes of Arkansas were so different from those in Texas in that regard that jurisdiction ought not to be taken, but the

court indicated that it would be a duty to do so in transitory actions where laws of both jurisdiction were similar. The question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co., *supra*."

In Huntington *v.* Attrill, 146 U. S. 657, it was said:

"In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, The Halley, L. R. 2 P. C., 193, 204; Phillips *v.* Eyre, L. R. 6 Q. B., 1, 28, 29; The M. Moxham, 1 P. D., 107; Wooden *v.* Railway Co, 126 N. Y., 10; Ash *v.* B. & O. Railway Co., 72 Md., 144. But such is not the law of this court. By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought. Smith *v.* Condry, 1 How., 28; The China, 7 Wall., 53; The Scotland, 105 U. S., 24; Dennick *v.* Railroad Co. 103, U., S. 11; Railway Co. *v.* Cox, 145 U. S., 593."

And again:

"That decision (referring to Dennick *v.* Railway Company) is important as establishing two points: 1st. The court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially: 2d. A statute of a State manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased might be enforced in a circuit court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in Texas and Pacific Railway Co. *v.* Cox, 145 U. S., 593,

where the Chief Justice speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: 'The question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co.'"

In Martin *v.* Railway Company, 151 U. S., 689, it was said: "The creation of the right by the Maryland statute is jurisdictional, the manner prescribed in which the right may be pursued is modal, formal, and remedial only."

In Northern Pacific Railroad Company *v.* Babcock, 154 U. S., 190, the court again reasserts the broad and general rule laid down in Dennick *v.* Railroad Company.

In its opinion the court quotes at length, and with approval, from the case of Herrick *v.* Minneapolis & St. Louis Railway Company, 31, Minn., 11, and also cites with approval and at length, Higgins *v.* Railway Company, 155 Mass., 176, and in conclusion, says: "The rule thus enunciated had been adopted in previous cases and has since been approved by this court. Smith *v.* Condry, 1 How., 28; the China, 7 Wall., 53; Dennick *v.* Railroad Co., 103, U. S., 11; the Scotland, 105 U. S., 24; Huntington *v.* Attrill, 146 U. S., 657. Indeed, in Texas & Pacific Railroad Co. *v.* Cox, *supra*, Mr. Chief Justice Fuller, speaking for the court said: 'the question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co.'"

In Railway Company *v.* Wyler, 159 U. S., 289, it was said: "It is an elementary rule that limitations are governed by the law of the forum, and not by the law of the place where the event happened, which gave rise to the suit."

In St. Louis Railway Company *v.* James, 161 U. S., 554, it was said: "Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature."

One would suppose that the decisions above referred to, emanating as they do, from the court of last resort, for the whole country, and broadly stated as they are, would be considered as absolutely binding on any inferior court.

But not so. The opinion of the learned Court of Appeals of the District of Columbia (Record, pp. 7 to 12) demonstrates that no case can ever be binding except so far as the subsequent judge thinks the principle which the previous judge applied to the case was correct, and was applicable. If the principle was correct, but inapplicable, then the case is not an authority. If the principle, though applicable, was not correct, then, also, the case is of no authority. This doctrine for enabling a judge to escape from the fetters of previous decisions reminds one of the Jester's answer in "All's Well That Ends Well." It is difficult to see how any previous decision can escape from it.

The opinion also seems to overlook the fact that courts are established by society for society, for the sake of justice; not to be arenas for the dialectic skill of disputants, and justice like science should advance.

A careful examination of the opinion shows that although three cases had been decided by the Supreme Court of the United States since the case of Dennick *v.* Railroad Company, in all of which the broad rule adopted and laid down in that case was reaffirmed, and, if anything, enlarged upon, yet the District Court of Appeals takes absolutely no notice of the decisions, does not refer or allude to them in any way, but, on the contrary (impliedly at least) overrules them, without taking the trouble to point out wherein the Supreme Court of the United States was in error when it made the decisions.

This is a rather forcible method of enforcing on us that if individuals and courts shall disregard judicial authority and carry out their own peculiar views, the harmony of

our system of jurisprudence must be destroyed and the law of might must become the arbiter of rights.

With all due deference to the great ability and profound learning of the distinguished Court of Appeals of the District of Columbia, it is respectfully submitted that that court has wholly misapprehended the intended scope of the utterances of the Supreme Court of the United States in the construction of similar statutes which have come before it for judicial construction, and have assumed that because the narrow question of whether the right conferred by the Maryland statute could be pursued in the District of Columbia had not been decided by it, the Court of Appeals was at liberty to ignore the positive utterances of the Supreme Court of the United States on the subject of damages for death by wrongful act.

An analysis of the Maryland act shows:

That it is based on Lord Campbell's Act.

That it is intended to give compensatory damages for the tort of death by wrongful act.

That the action lies when the death shall have been caused by the wrongful act, neglect, or default of the defendant, when an action might have been maintained therefor by the party injured if death had not ensued.

That there be in existence some one of the persons for whose benefit the action may be brought.

That the suit shall be brought in the name of the State of Maryland, as a formal party, for the use and benefit of the party or parties entitled.

That the amount recovered shall be apportioned by the jury among the beneficiaries, and is not liable for the debts of the deceased.

That the time in which the action may be brought has not elapsed.

An analysis of the District of Columbia Act shows identically the same things, with the exception that the latter act requires the administrator to be the formal party plaintiff, and bring the suit for the use and benefit of the real parties in interest, and that distribution is made to the parties in interest by the statute of descent and distribution instead of by the jury.

An analysis of the decisions of the Supreme Court of the United States, on the question of the maintenance of action in a foreign jurisdiction, shows:

That the validity of a contract, and right of action thereunder, is determined by the law of the place where made.

That the performance, remedy, bringing of suit, admissibility of evidence, statute of limitations, &c., depend upon the law of the forum.

That while the creation of a statutory right is jurisdictional, the manner in which the right may be pursued is modal, formal, and remedial.

That the wrong need not be actionable by the law of the place where the redress is sought.

That the private action may be maintained in a foreign State (if not contrary to its own or public policy) for a wrong done in another and actionable there, even if not actionable in the State where suit is brought.

That the rule that "the courts of no country execute the penal laws of another" does not apply to this action.

That the action, while dependent on statute, is not local, and the defendant may be held liable in any court to whose jurisdiction he can be subjected by personal service or by voluntary appearance.

That the nature of the remedy or the jurisdiction of the courts to enforce it is not dependent on the question whether it is a statutory or common law right.

That the action is in the nature of trespass to the per-

son, always held to be transitory, and the venue immaterial.

That the dissimilarity of statutes is no bar to an action in a foreign jurisdiction unless the right conferred by the one is repugnant to the public policy of the other.

That the "substantial similarity" or "substantial inconsistency" referred to in the decisions does not mean a substantial similarity in the methods of enforcing the right conferred, but a substantial similarity in the Acts conferring the right of action itself, leaving the method of enforcing the right in a foreign jurisdiction to the law of the forum.

That the question is one of general law and settled by the Supreme Court of the United States for itself, and in favor of the maintenance of the action in a foreign jurisdiction without regard to whether the foreign jurisdiction has a similar or, indeed, any statute on the subject; and in arriving at this conclusion the court expressly declines to be bound or controlled by the decisions of the State courts.

That the only class of laws which cannot be enforced extra-territorially are "penal" laws, and the only class of "penal" laws meant are "criminal laws"—that is to say, laws punishing crimes.

Construing the declaration by these principles, it is indeed difficult to see or appreciate the insuperable obstacles raised by the Court of Appeals of the District of Columbia to the maintenance of the action in this jurisdiction for a death occurring in Maryland.

Such statutes exist in nearly every State, and are based on and drawn from the English statute known as Lord Campbell's Act. It is true these various statutes differ to a considerable degree in the language in which they are expressed, both from the original English act and from each other, even in respect to the three features

which have been called the distinguishing characteristics of the action created by Lord Campbell's Act, as, for example, in some statutes it is not expressly provided that neglect or default must be such as would have entitled the party injured to maintain an action; in others it is not expressly provided that the action is for the benefit of the particular members of the family, and in others it is not expressly provided that the damages recoverable are such as result from the death. These differences, however, are not substantial. They are mainly in respect to the particular members of the family for whose benefit the action may be brought, the persons in whose names they may be brought, the time within which they may be brought, the amount which may be recovered, the manner of distribution, and in respect to practice; in short, the differences are formal, not fundamental. In spite of the difference of phraseology in the various statutes, and in the Maryland and District of Columbia statutes in particular, it is self-evident, from an inspection of them, that the principles applicable to the measure of damages under all these acts is the same, to wit, that the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.

If we are to accept the law on the subject from the defendant, then the Maryland Act, which creates the right of action sought to be enforced here, imparted to that right an intangible, undefinable—certainly undefined—quality, which makes it enforceable only within the four corners of the State of Maryland. To reverse the proposition, the defendant company could escape all liability by removing from the State of Maryland. The mere statement of the proposition demonstrates its absurdity.

We scan the Maryland Act in vain for anything, either in terms or by fair implication, which would warrant the conclusion that causes of action arising under that act,

which confers a civil remedy for a civil injury, can only be brought and enforced in that State; and even if such were the necessary construction from the wording of the act, it would be in direct conflict with the numerous decisions of the Supreme Court of the United States, and we have yet to learn that the Maryland legislature has had the patent of infallibility conferred on it.

The act follows:

"1. Whenever the death of a person shall be caused by the wrongful act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to a felony."

The above section makes the liability of the corporation absolute where the death arises from its negligence. There is no qualification. The tort having occurred, the right of action accrues.

What is there peculiar about this action which makes it of necessity enforceable only in Maryland? Because the action is a creature of statute and unknown to the common law? What distinguishes the action from others admitted to be transitory, so that it can only be enforced within the prescribed jurisdiction, while the right of courts to entertain jurisdiction of other actions for torts wherever the defendant can be found and served with process is not questioned? Is it because death ensues? Where and what is the line of authorities establishing as a legal proposition that death changes a transitory to an intransitory action? How is the right to be enforced? Is it a criminal law which can only be enforced in the State whose legislature passes it and the offence was committed? Or is it, though a statutory right, a civil action to

recover compensatory damages for a civil injury, as declared by the Supreme Court of the United States over and over again? Are we to be bound by the solemn utterances of the Supreme Court of the United States, and accept as a settled fact and one removed from the realm of controversy that the action of tort for death by wrongful act is transitory in its nature and the venue immaterial, or are we to conclude that the numerous utterances of that court on that point for the past seventeen years were mere empty phrases, and to be counted but as sounding brass or tinkling cymbals? What principle of jurisprudence is served by holding that the Maryland act does not give a right of action enforceable beyond the geographical limits of that State?

That the question is one of general law and definitely established in favor of the entertainment of jurisdiction by a foreign tribunal of such cases, unless it would be against good morals or natural justice, or that for some such reason the enforcement of it would be prejudicial to the general interests of the citizens of the State where the remedy is sought to be enforced; and that this conclusion has been reached by other courts than the Supreme Court of the United States see: Bruce's Adm'r *v.* Railway Co., 83 Ky., 174; Wooden *v.* Railway Co., 126 N. Y., 10; Morris *v.* Railway Co., 65 Iowa, 727; Burns *v.* Railway Co., 113 Ind., 169; Sheed *v.* Moran, 10 Ill. App., 618; Knight *v.* Railway Co., 108 Pa. St., 250; Railway Co. *v.* Doyle, 60 Miss., 977; Railway Co. *v.* Nix, 68 Ga., 572; Railway Co. *v.* Swint, 73 Ga., 651; Railway Co. *v.* Lewis, 24 Neb., 848; Railway Co. *v.* Sprayberry, 9 Heisk (Tenn.), 852; Railway Co. *v.* Ayres, 16 Lea (Tenn.), 725; Nelson's Adm'r *v.* Railway Co., 14 S. E. Rep., 838; Railway Co. *v.* Shield's Adm'r, 18 S. W. Rep., 944; Railway Co. *v.* McMullen, 117 Ind., 439; Higgins *v.* Railway Co.,

155 Mass., 176; Rorer on Interstate Law, 2d ed., 217; Herrick *v.* Railway Co., 31 Minn., 11, affirmed 127 U. S., 210.

III.

The plaintiff did not attempt to enforce the provisions of the Maryland Act, but to pursue a right accruing to him by virtue of that act, and sought his remedy in accordance with the mode of procedure of the local forum, on the theory that "where the right is found the remedy must follow, of course," and that the defendant, being a domestic corporation for the transaction of business, was entitled to the remedial limitation provided by the local forum.

In the case of Huntington *v.* Attrill, 146 U. S., 657, which was a case to enforce in Maryland a judgment obtained in New York, the Maryland Court of Appeals declined to maintain Huntington's right to enforce the judgment, because the judgment had, as the court held, been rendered in another State in an action for a penalty.

The Supreme Court, by Mr. Justice Gray, say:

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this court has jurisdiction on this writ of error. * * *

"In order to determine this question it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' (The Antelope, 10 Wheat., 66.)

"In interpreting the maxim there is danger of being misled by different shades of meaning allowed to the word 'penal' in our language.

"In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment,

whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. United States *v.* Reisinger, 128 U. S., 398; United States *v.* Choteau, 102 U. S., 603.

"But they are also commonly used as including any extraordinary liability to which the law subjects a wrong-doer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum,' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross to be paid for the non-performance of an agreement is considered as a penalty, the legal operation of which is to recover damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. Taylor *v.* Sandiford, 7 Wheat., 13.

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. According to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species; private wrongs and public wrongs.' The former are an infringement or privation of the private or civil rights belonging to individuals, and are thereupon frequently termed civil injuries; the latter a breach and violation of public rights and duties which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors. 3 Bl. Com., 2.

"Laws have no force of themselves beyond the jurisdiction of the State which enacts them and can have extra-territorial effect only by the comity of other States. The general rules of international comity upon this subject

were well summed up before the American Revolution by Chief Justice DeGrey, as reported by Sir William Blackstone: Crimes are in their nature local. And as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequnter rei*. Rafael *v.* Verelst, 2 W. Bl., 1055. * * *

"Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession. Whether actions to recover pecuniary damages for trespass to real estate, 'of which the causes, as observed by Mr. Westlake (Private International Law, 3d ed., p. 213), 'could not have occurred elsewhere than where they did occur,' are purely local or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only affording a personal remedy. By the common law of England, adopted in most of the States of the Union, such actions are regarded as local and can be brought only where the land is situated. Doulson *v.* Mathews, 4 T. R., 503; McKenna *v.* Fisk, 1 How., 241.

"But in some States and countries they are regarded as transitory, like other personal actions. * * *

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick *v.* Railroad Company, 103 U. S., 11."

"It has been demonstrated that the liability of the defendant company is a personal one; and a personal liability created by the statute of another State will, as other personal obligations, be enforced according to the course of procedure in the place where the defendant is found. Lowry *v.* Inman, 46 N. Y., 119; Pickering *v.* Fisk, 6 Vt., 102; Railway Co. *v.* Sprayberry, 8 Bax. (Tenn.), 341; Whitford *v.* Railway Co., 23 N. Y., 465; McDonal *v.* Mallory, 77 N. Y., 547; Vanderwenter *v.* Railway Co., 27 Barb., 244; Railway Co. *v.* Miller, 19 Mich., 305."

The variance in the party designated by the Maryland statute and the party actually suing is not such an one as to bar the action. The party actually suing does not sue in his broad representative capacity, but as a trustee for the beneficial party in interest, who is the same under both statutes. And, if it were deemed necessary to comply literally with the Maryland Act, the compliance could easily be made by amendment, as the amendment would be one of form and not of substance, and, when made, would relate back to the time of filing the suit. In that regard, however, it is proper to note that the Supreme Court in general term, in an unreported case, decided that the State of Maryland could not be a suitor in the District Court in an action of damages for death.

From the foregoing propositions, sustained as they are by eminent, authoritative, and conclusive decisions of the Supreme Court of the United States, and also of numerous and well-reasoned decisions by State courts, the following propositions, it is respectfully submitted, are established beyond controversy:

1. That the defense interposed by the demurrer, if in fact a defense, was a personal one which could be waived, and which was waived by the defendant when it pleaded the general issue.

2. That the action sought to be maintained here is a transitory one and the venue immaterial.

3. That the dissimilarity between the Maryland and District of Columbia statutes is not such as to bar the action here.

4. That the plaintiff is not seeking to enforce the provisions of the Maryland Act, but to prosecute here, in conformity with local procedure, the right of redressing a wrong, which right is created by the Maryland act, and may be enforced by the local tribunals in conformity with the local remedial procedure.

5. That the action here, seeking to pursue the right conferred on the party beneficially interested, would not and could not be barred unless the defendant showed affirmatively that the right created by the foreign statute, and sought to be enforced locally, was contrary to our public policy, or to abstract justice, or to pure morals, or was a penal (criminal) law, or was calculated to injure the local jurisdiction or its citizens.

For these reasons, it is submitted, the judgment of the court below sustaining the demurrer should be reversed.

EDWIN SUTHERLAND,

Attorney for Plaintiff in Error.

No. 97.
Brief of Hamilton & Colbert.
For D. C.
Filed Nov. 2, 1897.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 97.

THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

GEORGE E. HAMILTON,
MICHAEL J. COLBERT,
Attorneys for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-18-97

IN THE

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vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming a judgment rendered in the supreme court of the District of Columbia sustaining the defendant's demurrer to the plaintiff's declaration filed in said suit.

It appears from the record that John Andrew Casey, late of the District of Columbia, was employed as a postal clerk in the service of the United States on the line of the defendant company, and on October 6, 1888, was killed in a collision on the defendant's road in the State of Maryland,

between two stations known as Dickerson and Tuscarora, through the negligence, as it is alleged, of the defendant's agents. He left a widow, but no parent or child. Letters of administration on the estate of the deceased were taken out in the District of Columbia, and the administrator, Thomas W. Stewart, brought this suit, for the use of the widow, to recover damages for the death of John Andrew Casey, alleged to have been caused by the negligence of the defendant. The declaration in this suit is in the name of the administrator and contains two counts, both alleging the death to have occurred in the State of Maryland. The first count seems to be based upon the act of Congress affecting this subject and relating to the District of Columbia, while the second count is expressly based upon the Maryland act, which act is in the second count set forth *in extenso*. A demurrer was filed to the declaration based on these grounds, namely:

1. There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland by the alleged wrongful act of the defendant.

2. The provisions of the Maryland act cannot be enforced in the District of Columbia.

This demurrer was sustained by the trial court, and the judgment of that court affirmed by the Court of Appeals.

BRIEF OF ARGUMENT.

A declaration in a suit which seeks by the use of separate counts to recover statutory damages at once under a home and a foreign statute, which statutes, especially as to the form of remedy provided, are materially variant, is as novel as it is faulty, and it must appear that there is no error in the judgment of the court below in sustaining the demurrer because—

I.

There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland by the alleged wrongful act of the defendant.

At common law such actions, of course, could not be maintained, and the rule of the common law can only be departed from according to the scope and provisions of the statutes of the several States and in the District of Columbia of the act of Congress authorizing such suits. Turning to the act of Congress relating to the District of Columbia, entitled "An act to authorize suits for damages when death results from the wrongful act or neglect of any person or corporation in the District of Columbia" (23 Statutes at Large, page 301), we find that the wrongful or negligent act or injury causing the death must have occurred *within the limits of the District of Columbia.*

From the declaration in this suit it appears that the injury occurred at some place in the State of Maryland, and it would therefore seem to follow unquestionably that the demurrer must be sustained to the declaration, in so far as it is based upon the laws of the District of Columbia.

II.

Again, *the provisions of the Maryland act cannot be enforced in the District of Columbia.*

The only ground upon which this action could be maintained in the District of Columbia, by virtue of the provisions of the Maryland code, is that of comity; but to bring this rule of comity into application would require the statute of Maryland and the statute of the District of Columbia to be in all respects substantially similar. Comparing the acts of Maryland and of the District of Columbia, we find hat the laws of the two places are essentially dissimilar,

especially in the form of the remedy provided. Section 2 of the Maryland act provides "that every such action shall be for the benefit of the wife, husband, parent, or child of the person whose death shall have been so caused, and shall be brought in the *name of the State of Maryland for the use of the person entitled to damages*, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, *shall be divided amongst the above-named parties in such shares as the jury by their verdict shall find and direct.*" Now, the act of Congress relating to the District of Columbia provides that "every such action shall be brought by and in the name of the personal representative of the deceased person," and that the damages recovered "shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the District of Columbia." Under the law of Maryland in this case damages, if recovered, would go to the wife. Under our statute, if it had occurred in the District of Columbia, such recovery would have been equally divided between the wife and any collateral next of kin.

In discussing this question the Court of Appeals (Rec., p. 8) says:

"It will thus be seen that the equitable plaintiff is seeking to recover damages given by a law of Maryland for an injury suffered in that State by means of a remedy provided by the laws of this District for an injury suffered here. Can this be done?

"The case of Dennick *vs.* Railway Company, 103 U. S., 11, is, of course, the leading authority for us on this subject of recovery for injuries causing death. That was an action by the administratrix of a party killed through negligence in New Jersey, who had taken out letters and brought her action in New York. The laws of New York and New Jer-

sey were similar, and gave the right of action to the same person, the personal representative. When the court decided to apply the rule of State comity to torts, which had theretofore only applied to contracts—*i. e.*, when they held that what was made an actionable tort in one State must be so treated everywhere else—there was no difficulty in holding that the person to whom the right of action was given in both States might sue in either.

"But the present case presents quite a different question, the action being brought by a person to whom the statute under which relief is sought does not give a right of action.

"The case of Dennick *vs.* Railway Company, like all others, recognizes the right to damages for an injury causing death as a novelty in the law—as a right which did not exist at common law, but which is entirely statutory; and here the plaintiff is confronted with the rule that, in such case, the remedy provided by the statute is the only one that can be resorted to."

And the cases of Pollard *vs.* Bailey, 20 Wall., 520, and of the Fourth National Bank of New York *vs.* Francklyn, 120 U. S., 747, are cited and applied in support of the position of the Court of Appeals (Rec., p. 10). "These cases seem to fit the present case exactly. If the Legislature of Maryland had simply declared generally that a person causing the death of another wrongfully or negligently should be liable in damages to the family of the deceased, they might in their own names have instituted suit. But, since a particular form of action is prescribed, they are confined to that."

And further on (Record, p. 10), the Court of Appeals says:

"Again, it must be very clear that this action could not have been maintained in the State of Maryland. To hold that it can be maintained here would be to subject the defendant to different kinds of suits in every State in which they may happen to be instituted, which could not have been intended.

"There may be the best of reasons for confining the parties intended to be benefited to the very form of relief provided in the statute. The policy of the Maryland law was to confine that relief to the immediate family of the deceased, viz.,

the wife, parent, and child of a man; but in some of the States it is extended to collaterals, and in others it enures to the estate generally (Tiffany's Death by Wrongful Act, sec. 25, 81). While it is true that an administrator suing in another State to enforce rights given by the statute of Maryland might, as the supreme court say in Dennick *vs.* Railway Co., be required by the court to apply the proceeds according to the Maryland law, yet, on the other hand, it is also true that the administrator is subject to the law of his State, and by that law he might not be allowed to make such application, but might be required to administer them for the benefit of creditors and next of kin generally, which would be entirely contrary to the policy and intent of the Maryland law, which does not treat the damages recovered as the subject of administration.

"We are therefore of opinion that the present suit by the administrator to claim the damages allowed by the Code of Maryland for the injury alleged in the declaration cannot be maintained, and that an action therefor can only be maintained under that code by and in the name of the State of Maryland.

"But we further think that even this form of action was not intended by the Maryland Code to be authorized except in the courts of that State. It is incredible that the State would consent or intend to be a suitor in the courts of another jurisdiction in a matter not of public interest, especially where it would or might be for the use of a citizen of another State against her own citizens; and that is exactly this case, the defendant being incorporated by and being for certain purposes a citizen of Maryland.

"Again, the statute of Maryland gives the action for the use of the wife, parent, and child, not apportioning the damages among them, but leaving that to be done by the trial jury, and it is hardly to be supposed that the State of Maryland would attempt to impose a duty of that sort upon juries of other States or any others than the juries subject to her legislative control.

"If such be the intent of the Maryland statute it would seem that no relief can be had under it in any other State."

Bruce, adm'r, *vs.* Cincinnati R. R. Co., 83 Ky., 174.

The Court of Appeals (Rec., p. 11) says:

"The final objection to the maintenance of the present action is one foreshadowed in what has already been said, viz., that, in the language of Story's Conflict of Laws, sec. 556: 'It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians uniformly express it, according to the *lex fori;*' and that the proceeding directed by the Maryland Code is entirely foreign to the forensic law of this District, and could not be prescribed by the State of Maryland for the government of our courts.

"One of the very questions to be determined by the *lex fori* is, Who is to sue for a wrong? For example, as between assignor and assignee of a chose in action, that is to be determined by this law (Story's Conflict of Laws, sec. 566); and in common-law courts this would be held in one way, while in courts governed by the Roman civil law it might be different. (See also a discussion of this subject in Glenn *vs.* Busey, 5 Mackey, 243.)

"The Maryland Code recognizes a death wrongfully caused as an injury to the wife, child, and parent of the decedent. In this District, while we recognize actions *ex contractu* as properly brought by one for the use of another, an action *ex delicto* of that kind is unknown. By the common law, which is our *lex fori*, an action of that kind must be brought by the party injured, an exception being made only by our statute in relation to deaths wrongfully caused in this District, in which case, as if the cause of action survived, the personal representative may sue and distribute any damages recovered as the rest of the personal estate of the decedent, according to our statute of distributions. We are compelled by the authority of Dennick *vs.* Railway Co. to recognize the right to indemnity of the family of a decedent whose death was caused in Maryland by negligence, but we are not obliged to recognize the State of Maryland as a proper suitor in our courts in their behalf.

"Again, the statute of Maryland gives the right to damages to the wife, parent, and child of a male victim; but, instead of designating the proportions in which they shall be entitled, leaves that to be decided by a jury. Suppose

the statute had in terms provided that in any suit brought in another State for a death wrongfully caused in Maryland the damages should be divided among the parties in such manner as should be decided by the court trying the suit, could it be maintained that the court of a sister State could derive any authority or jurisdiction from the act of Maryland so to decide; and could it, with even as much show of reason, be held that the statute in question could impose a duty upon the court so to decide; and, if not the court, could the jury of another State be charged with any such duty?

"These questions must be answered in the negative. If the legislature of Maryland, instead of defining rights, leaves them to be decided elsewhere, it may speak with authority as to the tribunals of their own State, but they can neither confer authority nor impose a duty on those of another jurisdiction. If so, their statute under consideration cannot be executed in this District.

"The equitable plaintiff, then, would seem to be in this predicament, to wit, that she cannot sue, claiming under the law of Maryland, except by and in the name of that State, and that she cannot bring such a suit in this District because, first, the statute does not authorize such a suit, and, next, because it could not authorize such a suit if the legislature of Maryland had so intended."

In Ash, administratrix, *vs.* The Baltimore and Ohio Railroad Company, 72 Md., 147, where a Maryland administrator brought suit in that State on a statute of West Virginia for death occurring in West Virginia, the Court of Appeals, through Chief Justice Alvey, pointing out the dissimilarity of provisions existing between the statutes of the two States, held that the action could not be maintained. On page 148 he says:

"There is certainly no comity that requires one State to apply and administer the statute law of another in a case such as the present."

And in this same case it was decided that the Maryland statute, by reason of its peculiar and local provisions, had no extraterritorial force and could not be applied and enforced in other jurisdictions.

It is respectfully submitted that the judgment of the court below must be affirmed.

GEORGE E. HAMILTON,
MICHAEL J. COLBERT,
Attorneys for Defendant in Error.

STEWART v. BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 97. Argued November 8, 1897. — Decided December 6, 1897.

The Supreme Court of the District of Columbia has jurisdiction of an action, sounding in tort, brought by the administrator of a deceased person against the Baltimore and Ohio Railroad Company, to recover damages for the benefit of the widow of the deceased by reason of his being killed by a collision which took place while he was travelling on that railroad in the State of Maryland.

The purpose of the several statutes passed in the States in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is in its nature a tort, and where such a statute simply takes away a common law obstacle to a recovery for the tort, an action for that tort can be maintained in any State in which that common law obstacle has been removed, when the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.

While, under the Maryland statute authorizing the survival of the right of action, the State is the proper plaintiff and the jury trying the cause is to apportion the damages recovered, and under the act of Congress in force in the District of Columbia, the proper plaintiff is the personal representative of the deceased, and the damages recovered are distributed by law, these differences are not sufficient to render the statutes of Maryland inconsistent with the act of Congress, or the public policy of the District of Columbia.

On October 22, 1894, plaintiff in error as plaintiff filed in the Supreme Court of the District of Columbia an amended declaration containing two counts. The first alleged that John Andrew Casey, plaintiff's intestate, was killed through the negligence of the defendant company, in the State of Maryland; that said intestate left surviving no parent or child but only his wife, Alice Triplett Casey, for whose benefit this action was brought. The second count set forth in addition to the matters disclosed in the first a statute of the State of Maryland in respect to recovery in such cases. A demurrer

to this declaration was sustained and judgment entered for defendant. This was affirmed by the Court of Appeals of the District of Columbia, and from such judgment of affirmance plaintiff has brought the case here on error.

The statute in force in the District of Columbia, act of February 17, 1885, c. 126, 23 Stat. 307, provides for recovery in case the act causing death is done within the limits of the District of Columbia; that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured;" that the recovery shall not exceed $10,000; that the action shall be brought in the name of the personal representative of the deceased, and within one year after his death, and that the damages recovered shall not be appropriated to the payment of the debts of the deceased, but enure to the benefit of his or her family and be distributed according to the provisions of the statute of distributions. The Maryland statute, which is copied in the declaration, Rev. Code Maryland, 1878, p. 724, provides in the first section that whenever the death of a person shall be caused by the wrongful act, negligence, etc., of another, "the person who would have been liable if death had not ensued, shall be liable to an action for damages." Sections 2 and 3 are as follows:

"SEC. 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct: *Provided*, That not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced

within twelve calendar months after the death of the deceased person.

"SEC. 3. In every such action, the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

Mr. Edwin Sutherland for plaintiff in error.

Mr. George E. Hamilton for defendant in error. *Mr. Michael J. Colbert* was on his brief.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The Court of Appeals was of opinion that the action could not be maintained under the statute of the District of Columbia, because that authorizes recovery only in case the injury causing death is done within the limits of the District, nor under the Maryland statute because of the peculiar form of remedy prescribed therein, citing in support of the latter contention *Pollard* v. *Bailey*, 20 Wall. 520. A statute of Alabama made stockholders of a bank individually liable for its debts, and according to the construction given to it by the Supreme Court of the State the remedy provided was a suit in equity, whereas in that case a single creditor had sued one of the stockholders in an action at law; and in denying the right to maintain such action this court observed, page 526:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement. . . . The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced

by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

To like effect was cited *Fourth National Bank* v. *Franklyn*, 120 U. S. 747. The Court of Appeals was of opinion that the statute in Maryland not only created a statutory liability but prescribed a particular remedy, and that no action could be maintained, either in Maryland or elsewhere, unless that special remedy was pursued.

Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick* v. *Railroad Company*, 103 U. S. 11. It may well be that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained "where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which

the right of action is sought to be enforced." *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 605; see also *Dennick* v. *Railroad Company*, 103 U. S. 11; *Huntington* v. *Attrill*, 146 U. S. 657; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190.

What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 5 Cranch, 303; *M'Nutt* v. *Bland*, 2 How. 9; *State of Maryland, for use of Markley*, v. *Baldwin*, 112 U. S. 490. See, also, *Gaither* v. *Farmers' & Mechanics' Bank of Georgetown*, 1 Pet. 37, 42, in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: "This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit." It is true those were actions on contract, and this is an action for a tort,

but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party.

Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland. The judgment will be

Reversed, and the case remanded for a trial upon the merits.